MEMORANDUM OF LAW

DATE: April 13, 1990
TO: Ann Van Leer, Council Representative
FROM: City Attorney
SUBJECT: Political Activity of City Staff on Open Space and Park Bond Committee

Arising from the involvement of city staff on the Open Space and Park Bond Committee, you have recently inquired as to the limitations placed on public employees in support of ballot activities. We have repeatedly stressed that public employee activity on pending or potential ballot issues presents a delicate constitutional balance that is essentially struck by permitting an informational role but denying a promotional role. Stanson v. Mott, 17 Cal. 3d 206 (1976), and City Attorney Memoranda of Law of December 19, 1988; October 26, 1988; September 29, 1986; February 20, 1985; and Memoranda of August 20, 1985; August 7, 1981; June 20, 1975 and August 1, 1967.

It is only recently that the courts have confronted to what extent public employees may participate in creating ballot measures. In 1988, the League of Women Voters challenged the preparation of an initiative measure aimed at criminal justice reforms and using the staff time and administrative resources of a county district attorney's office in formulating, drafting and typing memoranda on various forms of the initiative. The League challenged the use of public time and resources as an improper expenditure of public funds in placing public resources in support of a ballot issue since it is fundamentally improper for government to bestow an advantage on one side of competing interests.

The court in League of Women Voters v. Countywide Crim. Justice Coordination Com., 203 Cal. App. 3d 529 (1988) recognized it faced an issue of first impression. While clearly one purpose of government was to formulate legislation, what limits existed in the initiative process to ensure that government did not become the principal promoter of an issue such that an unfair advantage existed?

Recognizing the dual activities of preparation and promotion the court found:

> Clearly, prior to and through the drafting stage of a proposed initiative, the action is not taken to attempt to influence voters either to qualify or to pass an initiative measure; there is as yet nothing to proceed

> to either of those stages. The audience at which these activities are directed is not the electorate per se, but only potentially interested private citizens; there is no attempt to persuade or influence any vote ┌citationσ. It follows those activities cannot reasonably be construed as partisan campaigning. Accordingly, we hold the development and drafting of a proposed initiative was not akin to partisan campaign activity, but was more closely akin to the proper exercise of legislative authority.

League, 203 Cal. App. 3d at 550.

Once formulated, however, the promotion of a ballot measure presents the spectre of governmental advocacy. Stanson and its progeny clearly permit government information but distinguish between public education and public advocacy.

> Whether CCJCC legitimately could direct the task force to identify and secure a willing sponsor is somewhat more problematical. The power to direct the preparation of a draft proposed initiative does not necessarily imply the power to identify and secure a willing proponent to sponsor it thenceforward. On the one hand, it can be argued the power to draft the proposed initiative is essentially useless without the power to seek out a willing proponent and the latter power thus must be implied. On the other hand, it can be argued this brings CCJCC, as an arm of the board of supervisors, too close to impermissible publicly funded political activity, in that it necessarily involves some degree of advocacy or promotion. The logical force of the latter view depends largely on the approach the task force employed in identifying a willing proponent.
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> To the extent CCJCC had authority to direct the performance of the above acts, it is clear the county's elected officers had authority to participate in CCJCC and its subcommittees and to perform a broad spectrum of tasks at public expense. It is only at the point the activities of CCJCC and its subcommittees cross the line of improper advocacy or promotion of a single view in an effort to influence the electorate that the actions of elected officers or their deputies, undertaken at public expense, likewise would become improper.

League, 203 Cal. App. 3d at 553-554.

Stressing the distinction between preparation and promotion,

you are advised that city employees may properly utilize time and necessary support to explore, prepare and finalize ballot language. However, there should be no public employee time or resources devoted to fundraising or public relations since this is more concerned with improper advocacy than with permissible information. Of course, this restriction does not apply to citizen volunteers or employees whose efforts are clearly out-side their public employment.

As you can see, government need not stand silent in the face of pressing issues. Its voice, however, must have the measured tone of information and not advocacy.

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By
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